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10 WESTCHESTER FIRE INSURANCE COMPANY

11 IN THE UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13 Case No.: C 07 2853 SBA

14 LENSRAFTERS, INC.; and EYEXAM OF
15 CALIFORNIA, INC.,

16 COUNTER-CLAIM AND CROSS-CLAIM OF
17 WESTCHESTER FIRE INSURANCE
18 COMPANY FOR DECLARATORY RELIEF

19 Plaintiff,

20 vs.

21 LIBERTY MUTUAL FIRE INSURANCE
22 COMPANY; EXECUTIVE RISK SPECIALTY
23 INSURANCE COMPANY; UNITED STATES
24 FIRE INSURANCE COMPANY; MARKEL
25 AMERICAN INSURANCE COMPANY; and
26 WESTCHESTER FIRE INSURANCE
27 COMPANY,

28 Defendant

WESTCHESTER FIRE INSURANCE
COMPANY,

Counter-Claimant and Cross-Claimant,

vs.

LENSRAFTERS, INC.; EYEXAM OF
CALIFORNIA, INC.,

Counter-Defendants,

LIBERTY MUTUAL FIRE INSURANCE)
 COMPANY; EXECUTIVE RISK)
 SPECIALTY INSURANCE COMPANY;)
 UNITED STATES FIRE INSURANCE)
 COMPANY; and MARKEL AMERICAN)
 INSURANCE COMPANY,)
 Cross-Defendants.)

Defendant, Counter-Claimant and Cross-Claimant Westchester Fire Insurance Company ("Westchester Fire") alleges as follows:

INTRODUCTION

1. This counter-claim and cross-claim seeks declarations and adjudications with respect to Westchester Fire's duty to indemnify counter-defendants LENSRAFTERS, INC. ("LensCrafters") and EYEXAM OF CALIFORNIA, INC. ("Eyexam") as to an underlying civil action entitled *Melvin Gene Snow, et al. v. LensCrafters, Inc., et al.*, filed in the Superior Court of the State of California for the County of San Francisco as Case No. CGC-02-40554 (the "*Snow* action"). (Lenscrafters and Eyexam are collectively referred to herein as "plaintiffs".) In the alternative, Westchester Fire seeks declarations and adjudications concerning the respective rights and obligations of the insurer cross-defendants to potentially indemnify plaintiffs against the *Snow* action.

2. There is a present, active controversy between Westchester Fire, LensCrafters and Eyexam, and the other insurer defendants, concerning insurance coverage, if any, for the *Snow* action under the insurer defendants' respective insurance policies. A declaration of rights and obligations by this court is appropriate at this time so that the parties may know their respective rights and obligations, if any, with respect to insurance coverage for the *Snow* action.

THE PARTIES

3. Westchester Fire is a New York corporation authorized to transact business as an insurer in the State of California and other states.

4. Westchester Fire is informed and believes, and based thereon alleges, that LensCrafters is an Ohio corporation with its principal place of business in the State of Ohio.

5. Westchester Fire is informed and believes, and based thereon alleges, that Eyexam is a California corporation with its principal place of business in the State of Ohio.

6. Westchester Fire is informed and believes, and based thereon alleges, that cross-defendant Liberty Mutual Fire Insurance Company ("Liberty Mutual") is a Massachusetts corporation whose principal place of business is unknown.

7. Westchester Fire is informed and believes, and based thereon alleges, that cross-defendant Executive Risk Insurance Company ("ERSIC") is a Connecticut corporation whose principal place of business is unknown.

8. Westchester Fire is informed and believes, and based thereon alleges, that cross-defendant United States Fire Insurance Company ("U.S. Fire") is a Delaware corporation whose principal place of business is unknown.

9. Westchester Fire is informed and believes, and based thereon alleges, that cross-defendant Markel American Insurance Company (“Markel American”) is a Virginia corporation whose principal place of business is unknown.

JURISDICTION

10. This Court has jurisdiction pursuant to 28 U.S.C. sections 1332 and 2201. Westchester is informed and believes there is complete diversity of citizenship between Westchester Fire and counter-defendants and cross-defendants, and the amount in controversy exceeds the sum of \$75,000, exclusive of interests and costs. An actual controversy within the meaning of 28 U.S.C. section 2201 exists among the parties.

11. Venue is proper in the Northern District of California pursuant to 28 U.S.C. section 1391, because the alleged events and omissions giving rise to this Counter-Claim are alleged to have occurred in this District.

FACTUAL BACKGROUND

The *Snow* Action

12. The *Snow* action is a putative class action alleging purported causes of action for, among other things, violation of the California Unfair Business Practices Act, the California Consumer Legal Remedies Act and the California Confidentiality of Medical Information Act. It is

generally alleged that optometrists and opticians were unlawfully co-located in stores operated by LensCrafters in the State of California, and that confidential patient information was improperly shared among optometrists, opticians and other employees of LensCrafters and/or Eyexam. The *Snow* action seeks injunctive relief, statutory damages, compensatory damages, and other relief.

13. Plaintiffs have requested that Westchester Fire and the other insurer cross-defendants agree to indemnify it for any judgment or settlement in the *Snow* Action.

LensCrafters' and Eyexam's Insurance Policies

14. Westchester Fire is informed and believes, and based thereon alleges, that plaintiffs are named insureds under commercial general liability policies Liberty Mutual issued to plaintiffs' parent company for eight consecutive annual policy periods from February 1, 1998 through February 1, 2006 (the "Liberty Mutual Policies"), and that each of the Liberty Mutual Policies has liability limits of \$3 million each occurrence and \$6 million in the aggregate per location.

15. Westchester Fire is informed and believes, and based thereon alleges, that plaintiffs are named insureds under a Managed Care Organization Errors and Omissions Liability policy issued by ERSIC for a policy period from November 12, 2001 to November 1, 2002 (the "ERSIC Policy"), and that the ERSIC Policy has liability limits of \$3 million for each claim or related claims and \$3 million in the aggregate.

16. Westchester Fire is informed and believes, and based thereon alleges, that plaintiffs are named insureds under commercial umbrella policies U.S. Fire issued to plaintiffs' parent company for three consecutive annual policy periods from February 1, 1998 to February 1, 2001 (the "U.S. Fire Policies"), and that each of the U.S. Fire Policies has liability limits of \$25 million in excess of the retained limit for each occurrence and in the aggregate.

17. Westchester Fire is informed and believes, and based thereon alleges, that LensCrafters and Eyexam are named insureds under a commercial umbrella policy Markel American issued to plaintiffs' parent company for a policy period from February 1, 201 to February 1, 2002 (the "Markel American Policy"), and that the Markel American Policy has liability limits of \$15 million per occurrence and in the aggregate in excess of the underlying insurance.

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18. Westchester Fire issued to plaintiffs' parent company an Excess Umbrella Policy, Policy No. MEA-675648, for a policy period from February 1, 2001 to February 1, 2002 (the "Westchester Fire Excess Policy"). The Westchester Fire Excess Policy is excess to, and follows form in part to, the Markel American Policy. The Westchester Fire Excess Policy has liability limits of \$10 million per occurrence and in the aggregate in excess of the Markel American Policy.

19. Westchester Fire also issued to plaintiffs' parent company the following commercial umbrella policies: Policy No. CUA-150963 for the policy period from February 1, 2002 to February 1, 2003; Policy No. CUA-706488 for the policy period from February 1, 2003 to February 1, 2004; Policy No. CUW-774410 for the policy period from February 1, 2004 to February 1, 2005; and Policy No. CUW-785695 for the policy period from February 1, 2005 to February 1, 2006 (collectively the "Westchester Fire Umbrella Policies"). Each of the Westchester Fire Umbrella Policies has liability limits of \$25 million in excess of the retained limit per occurrence and in the aggregate.

FIRST CLAIM FOR RELIEF FOR DECLARATORY RELIEF

20. Westchester Fire repeats and incorporates herein by reference each and every allegation contained in paragraphs 1 through 19, inclusive, of this Counter-Claim and Cross-Claim.

21. An actual controversy exists between Westchester Fire, on one hand, and plaintiffs, on the other hand, concerning their respective duties and rights under the Westchester Fire Excess Policy and the Westchester Fire Umbrella Policies. Westchester Fire is informed and believes, and based thereon alleges, that plaintiffs contend Westchester Fire is obligated to indemnify them with respect to a potential judgment or settlement in the *Snow* Action; whereas Westchester Fire contends that it has no obligation to indemnify plaintiffs, or either of them, and/or that the extent of its obligation is not as extensive as contended by plaintiffs.

22. Plaintiffs are not entitled to coverage under the Westchester Fire Excess Policy or the Westchester Fire Umbrella Policies for the *Snow* Action for one or more of the following reasons:

a. The *Snow* Action does not allege damages that would constitute "bodily injury", "property damage", "advertising injury" or "personal injury" as those terms are defined in the Westchester Fire Excess Policy or the Westchester Fire Umbrella Policies;

b. The Westchester Fire Umbrella Policies each contain the “Known Injury Or Damage Endorsement”, which would preclude coverage under all of the Westchester Fire Umbrella Policies after the February 1, 2002 to February 1, 2003 policy period;

c. The Westchester Fire Excess Policy and the Westchester Fire Umbrella Policies do not provide coverage for punitive or exemplary damages, fines or penalties;

d. Plaintiffs failed to provide timely and adequate notice of the *Snow* Action as required by the Westchester Fire Excess Policy and the Westchester Fire Umbrella Policies;

e. LensCrafters and Eyexam have failed to obtain and maintain underlying insurance as required by the Westchester Fire Excess Policy and the Westchester Fire Umbrella Policies;

f. The limits of liability of the Liberty Mutual primary policies and the Markel American umbrella policy have not been completely and properly exhausted.

23. Westchester Fire desires a judicial determination and declaration that the Westchester Fire Excess Policy and the Westchester Fire Umbrella Policies do not obligate Westchester Fire to indemnify plaintiffs against the *Snow* Action and/or as to the extent of any such obligation to indemnify. A declaration of rights by this Court is appropriate at this time so that the parties may know their respective rights and obligations, if any, with respect to their controversies and disputes, and to avoid a multiplicity of actions.

SECOND CLAIM OF RELIEF FOR DECLARATORY RELIEF

24. Westchester Fire repeats and incorporates herein by reference each and every allegation contained in paragraphs 1 through 19, inclusive, of this Counter-Claim and Cross-Claim.

25. While Westchester Fire denies that it owes plaintiffs any duty to indemnify with respect to the *Snow* Action, to the extent any such obligation is imposed upon Westchester Fire, Westchester Fire contends that it is excess to, or entitled to contribution or indemnification from, Liberty Mutual, ERSIC, U.S. Fire, and/or Markel American. A declaration of the respective coverage in the respective insurance policies issued by the various insurer cross-defendants is necessary with regard to indemnity coverage for the *Snow* Action.

26. Westchester Fire desires a judicial determination and declaration that Westchester Fire’s obligations, if any, to plaintiffs are excess to, or that it is entitled to contribution or

1 indemnification from, Liberty Mutual, ERSIC, U.S. Fire and/or Markel American. A declaration of
2 rights by this Court is appropriate at this time so that the parties may know their respective rights
3 and obligations, if any, with respect to their controversies and disputes, and to avoid a multiplicity
4 of actions.

5 WHEREFORE, Westchester Fire requests this Court to enter judgment as follows:

6 1. With respect to the First Claim for Relief, a declaration that Westchester Fire has no
7 duty to indemnify plaintiffs for any judgment or settlement in the *Snow* Action or in the alternative
8 a declaration as to the extent of Westchester Fire's obligations to indemnify plaintiffs;

9 2. With respect to the Second Claim for Relief, a declaration as to the respective duties
10 of the cross-defendants Liberty Mutual, ERSIC, U.S. Fire and/or Markel American with regard to
11 indemnification obligations for the *Snow* Action and/or that Westchester Fire is entitled to
12 contribution or indemnification from Liberty Mutual, ERSIC, U.S. Fire and/or Markel American for
13 any obligation imposed on Westchester Fire to indemnify with respect to the *Snow* Action;

14 3. For costs of suit incurred in this action; and

15 4. For such other and further relief as the court deems just and proper.

16 DATED: *July 18, 2007*

HARRIS, GREEN & DENNISON
A Professional Corporation

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19 By: 

20 ROBERT D. DENNISON,
21 Attorneys for Defendant, Counter-Claimant and
22 Cross-Claimant,
23 WESTCHESTER FIRE INSURANCE COMPANY
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PROOF OF SERVICE

I, SHIRLEY AOKI, am employed in the aforesaid county, State of California: I am over the age of 18 years and not a party to the within action: my business address is 5959 West Century Boulevard, Suite 1100, Los Angeles, California 90045.

On July 18, 2007, I served the following document described as:

**COUNTER-CLAIM AND CROSS-CLAIM OF WESTCHESTER FIRE INSURANCE
COMPANY FOR DECLARATORY RELIEF**

VIA THE UNITED STATES DISTRICT COURT ELECTRONIC FILING SERVICE on interested parties in this action set forth below:

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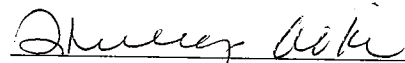
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Attorney for Defendant,
Markel American Insurance Company

10 Executed on July 18, 2007, at Los Angeles, California. I certify (or declare) under penalty of
11 perjury under the laws of the State of California that the foregoing is true and correct.
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14 SHIRLEY AOKI
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